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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ROBERT H. RATH et al., Plaintiffs and Appellants, v. CHRISTENSEN DEVELOPMENT COMPANY, INC. et al., Defendants and Respondents.	F017001 (Super. Ct. No. 350244-0) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Fresno County. Blaine Pettitt, Judge.

Georgeson & Belardinelli, C. Russell Georgeson and David L. Rowell, for Plaintiffs and Appellants.

Dowling, Magarian, Phillips & Aaron, Kent F. Heyman and Jay B. Bell for Defendants and Respondents.

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This case arises from transactions involving a piece of commercial real property known as Fine Square (the property). Appellants Robert H. Rath, et al. (collectively Rath),[1] sold the property to respondents Christensen Development Company, Inc, et al. (collectively Christensen). After the sale of the property, Rath sued and Christensen countersued. In an attempt to resolve the two suits, the parties came to a settlement agreement (the settlement agreement or the agreement) before the court. When Rath refused to perform, Christensen successfully moved to enforce the settlement agreement. Rath appeals from the trial court's order enforcing the settlement agreement.

FACTS[2]

On about November 14, 1981, Rath sold the property to Christensen. As part of the transaction, Christensen tendered a promissory note to Rath. Christensen, however, was dissatisfied with the transaction and failed to pay on the note. On July 1, 1986, Rath sued Christensen to collect on the note, and, on October 20, 1986, Christensen countersued Rath for, among other things, breach of contract, fraud and deceit, and rescission. The parties eventually negotiated a settlement agreement, the subject of this appeal, which they recited on the record of the court on January 9, 1989. By its terms, the agreement became binding at that time.

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1 In the record, appellants are designated collectively as Trio, an investment group.

2 The parties in their briefs make reference to numerous facts not a part of the record on appeal. In many instances, the references are to facts recited during the legal arguments, written and oral, made by the respective lawyers in the trial court but not contained in any declaration, testimony, or other accepted form of evidence incorporated in the appellate record. We consider only the admissible evidence presented to the trial court and included in the record on appeal. Though it might be possible to compare the presentations of the parties in the trial court in order to determine whether any relevant facts were assumed, admitted, or stipulated to by one or more parties, we decline to engage in such an effort given the absence of any guidance on, or reference to, such subjects in the briefs of the parties.

According to the settlement agreement, Christensen would stipulate to a judgment of $42,500 in the suit Rath had filed against it, and Christensen would dismiss the cross-complaint it had filed against Rath. To convey the property back to Rath, Christensen would transfer the property to an irrevocable trust for a period of 18 months. During those months, Christensen would be required to maintain the property and perform additional obligations, including payment on the first deed of trust, payment of taxes, and payment of association dues. In addition, during those 18 months, Rath would have the irrevocable right to sell the property. If, at the end of the 18-month period, the property had not been sold, the property, along with its leases and obligations, would be transferred to Rath. However, the transfer would be subject to Rath's approval of "the state of the title, the lease, and the C.C. & R.'s [covenants, conditions, and restrictions]" for the property.

In July 1989, six or seven months into the 18-month period, Christensen sent Rath a preliminary title report that showed there were some tax liens and a second deed of trust on the property, given by Christensen to American Savings and Loan as collateral in a subsequent unrelated financial transaction.

On February 13, 1991, Christensen moved to enforce the settlement agreement pursuant to Code of Civil Procedure section 664.6.[3]

In a declaration in support of the motion, Richard Swinney, senior vice-president and counsel for New West Federal Savings & Loan,[4] stated that he had discussed with

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[3] All statutory references are to the Code of Civil Procedure unless otherwise noted.

"Section 664.6 was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809.)

[4] New West Federal Savings and Loan was a successor, by assignment, of American Savings and Loan.

Christensen the possibility of reconveying the second deed of trust as part of a settlement of the Rath-Christensen dispute. Swinney said that New West Federal Savings and Loan had "always been willing to reconvey that deed of trust for the purpose of eliminating it as an encumbrance on the title to the … property." Swinney asserted that New West Federal Savings and Loan was willing to deposit a reconveyance of the second deed of trust into the property escrow, which reconveyance would be recorded through the escrow, provided that Rath and Christensen executed a "settlement agreement" and that "all other applicable conditions as set forth in that certain Indemnity and Cooperation Agreement dated July 30, 1987 between [Christensen] and [American Savings and Loan], among others, have been satisfied."

In a declaration filed in opposition to the motion, Rath stated that the agreement "provided [him] with the opportunity to review[,] among other things, the status of the Preliminary Title Report, and the terms of the lease with the major tenant of [the] property before the settlement became effective and enforceable." He did not receive a copy of the preliminary title report from Christensen until almost six months after the settlement agreement. The report established that several tax liens and a second deed of trust encumbered the property. Rath noted that, even by that time, Christensen had not taken steps to provide clear title to the property. Rath never received any written statement to establish that New West Savings and Loan had at all times expressed its willingness to reconvey the second deed of trust through the close of escrow, nor was this a term of the settlement agreement. The agreement made the settlement contingent on his approval and he could not approve the condition of the title when it was encumbered by the second deed of trust and the tax liens. Rath had not agreed to accept title if American Savings and Loan agreed to reconvey the second deed of trust through the close of escrow, and he had not agreed to accept title to the property if title was in the same condition as when he sold the property to Christensen. Rath also stated that he had reviewed the lease executed by a major tenant of the property and did not approve of

some of the lease terms. Rath later learned that the tenant had vacated the property, which led Rath to believe that the lease was only for settlement purposes and that it was not intended as a long-term rental. Thus, because "[t]he condition of the title and the terms were not acceptable to [Rath, o]n December 21, 1989, pursuant to [his] rights under the Settlement Agreement, [he] demanded [they] proceed with trial of this matter."[5]

On September 16, 1991, the court held a hearing on Christensen's motion to enforce the settlement agreement. No testimony was taken.

On September 27, 1991, after considering the settlement agreement, the written briefs, the argument, and extensive correspondence between the parties and other documents, the court granted Christensen's motion, on four bases. First, the settlement agreement was clear and binding and public policy called for its enforcement. Second, the disputes were due significantly to inordinate delay on both sides and all the evidence pointed to a method of resolution of the second deed of trust through the known escrow opened months earlier at the title company. The court found no evidence that Christensen's delay in filing the motion to enforce the agreement caused Rath to suffer any detriment or waived Christensen's enforcement of the agreement. Third, Rath's refusal to accept the condition of the property's title and leases was without merit and unreasonable under the standard of a reasonable person. (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209.) There was no evidence that a reasonable person would

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[5] Rath's declaration also contains statements describing his reasons for wanting the "approval" clause to be included in the settlement agreement. Because such statements disclose only the personal subjective intentions of Rath with respect to the clause, they are irrelevant. (*Roden v. Bergen Brunswick Corp.* (2003) 107 Cal.App.4th 620, 629 [a party's undisclosed intention is not admissible to determine the meaning of a contract term]; see generally 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 684, p. 617 and Witkin, Summary of Cal. Law (9th ed., 2004 pocket supp.) Contracts, § 684, pp. 395-396.)

refuse to accept title in the condition in which it would have been at the close of escrow. Fourth, Christensen's seven-month delay in delivering the title report did not amount to a breach of the agreement because its terms provided for an 18-month delay in delivering title to Rath if the property could not be sold. Time was not of the essence or of any real importance during the seven-month delay. The material delay was Rath's delay in delivering the necessary trust documents to Christensen.

Pursuant to section 664.6, the court ordered enforcement of the settlement agreement by entry of judgment consistent with the agreement's terms.

DISCUSSION

I.

Rath first contends the trial court erred because it utilized the wrong legal standard in applying the satisfaction clause in the settlement agreement. According to Rath, the proper standard was not the objective reasonable person test used by the court but rather the subjective personal judgment test, and, because the evidence showed that Rath acted in good faith in disapproving the state of title, the trial court should have found for Rath.

Since the evidence did not show that Rath disapproved of any covenant, condition, or restriction, and because the evidence showed that the only lease mentioned in the record did not exist at the time of the hearing, the question here is what test, subjective or objective, governs Rath's assessment of the state of the title to the property. We think it is the objective test, and thus the trial court did not err.

Kadner v. Shields (1971) 20 Cal.App.3d 251 is on point, though the satisfaction clause in that case did not involve the state of the title to real property. Under the satisfaction clause in question in *Kadner*, the prospective purchasers of real property had the right to approve the terms and conditions of an existing first encumbrance that the purchasers would assume upon the sale. (*Id*. at p. 255.) The Court of Appeal held that the objective test of reasonableness applied to assess the validity of the purchasers' disapproval of the terms and conditions of the encumbrance. (*Id*. at p. 262.) The court

came to this conclusion because (1) the language of the clause did not expressly state that the purchaser's approval was subject only to their personal judgment and discretion, and (2) the preference of the law in doubtful cases is the less arbitrary standard of the reasonable man. (*Id.* at p. 263.)[6] According to the court,

> "In cases where the personal judgment test has been applied, the situation most frequently is one of a matter of esthetic taste and sometimes of feasibility of operation or management irrespective of financial impact. ... Moreover, the decisions teach that in those nonspecific situations (other than the furnishing of esthetic endeavors or works wherein the element of taste clearly makes personal satisfaction appropriate) where the personal satisfaction test has been held to apply something more than financial impact appears to be involved, such as compatibility of personality or ease or workability of operation…. Furthermore, the objective gauge of the reasonable mind is generally applied where factors of commercial value or factors of financial concern are involved." (*Kadner v. Shields, supra,* 20 Cal.App.3d at pp. 263-264; see also *Storek & Storeck, Inc. v. Citycorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 59-60.)

Here, as in *Kadner*, the satisfaction clause did not state that Rath's approval of the state of the title was solely a matter of his personal judgment. Here, as in *Kadner*, "there is nothing of personal taste connected with the acceptability of the" state of a title to real property. (*Kadner v. Shields, supra,* 20 Cal.App.3d at p. 267.) And here, as in *Kadner*, the state of a title is essentially a "matter of commercial practice," "commercial quality and [commercial] value," rather than a matter of personal taste. (*Id.* at p. 268; see also *Van Demark v. California Home Extension Assn.* (1919) 43 Cal.App. 685, 687 [the objective test applies where a satisfaction clause involves the "quality or value of things in common use which have a fixed and recognized standard of fitness and worth, and

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6 As far back as 1890 the Supreme Court held that the objective test applied to a satisfaction clause that nullified the sale of property if the "title [was] not satisfactory to [the] purchaser." (*Benson v. Shotwell* (1890) 87 Cal. 49, 56-57; see also *Williams v. Belling* (1926) 76 Cal.App. 610, 616 [approval of mortgage].)

concerning which it is fair and equitable to require a purchaser to be satisfied with the commonly accepted standard of excellence"]; *Guntert v. City of Stockton, supra,* 43 Cal.App.3d at p. 213 [ambiguous satisfaction clause; objective test applied where lessor authorized to terminate lease if lessor was satisfied with a third party's development proposal for the leased property]; *Storek & Storeck, Inc. v. Citycorp Real Estate, Inc.*, *supra*, 100 Cal.App.4th at pp. 60-61 [objective test applied where disbursing agent required to pay on a construction loan if the agent was satisfied that the project budget was "in balance"].)

We do not find apposite cases such as *Church v. Shanklin* (1892) 95 Cal. 626 at pages 627-628, *Allen v. Pockwitz* (1894) 103 Cal. 85 at pages 88-89, and *Parkside Realty Co. v. MacDonald* (1913) 166 Cal. 426 at page 434 because they involved clauses which provided that the title be approved, in whole or part, by a third person who was not a party to the various contracts in issue. We also do not find controlling *Larwin-Southen California, Inc. v. JGB Investment Co.* (1979) 101 Cal.App.3d 626 because the clause in issue there, unlike the clause in issue here, made clear by its terms that the approval was entirely a matter of the buyer's "sole judgment and discretion." (*Id.* at pp. 631-632.)

We note that we have decided only the precise issue raised by Rath and have not addressed, explicitly or implicitly, any other related but unraised issue, such as which party had the burden of proof on the question about the reasonableness of Rath's disapproval or whether substantial evidence supported the trial court's decision that Rath's disapproval was unreasonable. (See, e.g., *Kadner v. Shields, supra,* 20 Cal.App.3d at p. 270.)[7]

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[7] Rath, in his reply brief, did seem to take the position, in one paragraph without citation to authority, that the trial court's finding of unreasonableness was not backed by sufficient evidence. However, even if we assume these few sentences constitute an adequate presentation of the issue and even if we ignore the inadequacy of the record (see

II.

Rath also contends that the trial court erred in finding that Christensen unreasonably delayed in moving to enforce the settlement agreement. According to Rath, Christensen's tardiness "satisfies" the "doctrines" of estoppel, waiver, and laches.

We will not decide these contentions, for two reasons. First, Rath's brief on these topics consists of nothing more than a statement of the supposed facts, a bald assertion of opinion that the three doctrines apply, and a string of citations to various legal authorities with respect to each doctrine. No effort is made in Rath's brief to relate the particular evidentiary facts to the independent elements of any of the three doctrines in order to demonstrate with clarity why Rath's general contention that the doctrines apply should be accepted by this court. Instead, Rath apparently wants us to attempt to discern on our own what argument he intended to make on each topic by requiring us to read all the authorities he has cited and then to evaluate the facts he has referred to against whatever legal principles we may extract from the authorities, so as to come to a conclusion about the accuracy of his conclusory opinion that the trial court erroneously failed to apply any of the three doctrines. In other words, he would not only have us assess the arguments he intends to make but would have us frame them for him as well. We are not obliged to do, and will not do, what Rath is obliged to do himself. (*Associated Builders & Contractors, Inc. v. San Francisco Airport Comm'n* (1999) 21 Cal.4th 352, 366 [appellate court may treat as waived any issue which, though raised in the briefs, is not supported by pertinent or cognizable legal argument or proper citation of authority]; *Dills v. Redwoods Assocs., Ltd.* (1994) 28 Cal.App.4th 888, 890 [appellants' briefs made only passing reference to

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Part II of this opinion), we will not address the issue. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [arguments raised for the first time in a reply brief will be disregarded].)

certain issues, without argument or authority; the court would "not develop the appellants' arguments for them," and therefore declined to reach the inadequately treated issues]; see generally Eisenberg, Horowitz & Weiner, Cal. Prac. Guide -- Civil Appeals & Writs (Rutter Group, 2003), § 8:17.1, p. 8-5.) If Rath's contentions were worthy of presenting to this court, they were worthy of explaining to this court.[8]

Second, Rath has not shown by a complete record that the trial court's decision is incorrect as a matter of law. It appears from the reporter's transcript that the trial court had before it, by the agreement of the parties, a number of documents, including notes of telephone conversations, correspondence, and a declaration by one David Rumsey. None of these documents has been made a part of the appellate record. It also appears from the reporter's transcript of the arguments before the trial court that some of these documents are relevant to the waiver, estoppel and laches defenses Rath raised in the trial court and alluded to in his briefs in this court. An appellant such as Rath has the affirmative duty to overcome the presumption of correctness that accompanies the trial court's decision and, to do this, must present a record sufficient to establish the occurrence of the asserted error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) Any ambiguity disclosed by the failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. (*Id*. at pp. 1295-1296; *Gee v. American Realty & Const., Inc.* (2002) 99 Cal.App.4th 1412, 1416; see generally Eisenberg, Horowitz & Weiner, Cal. Prac. Guide -- Civil Appeals & Writs (Rutter Group, 2003), § 8:16-8:17, p. 8-5.) Rath's failure to provide this court with the complete record of the evidence relevant to the

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8 We are also not required to review the arguments Rath's counsel made in the trial court in order to determine the substance of Rath's arguments on this appeal. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 109 [an appellant cannot rely on incorporation of trial court papers but must tender an independent argument in the appellate briefs].)

defenses of waiver, estoppel, and laches means that we must accept the trial court's findings on these topics.

DISPOSITION

The judgment (order) appealed from is affirmed. Costs on appeal are awarded to respondents.

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Dibiaso, Acting P.J.

WE CONCUR:

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Buckley, J.

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Dawson, J.